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No. 805

In the Supreme Court of the United States

OCTOBER TERM, 1959

THOMAS ROBINSON and ELAINE ROBINSON,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and other authorities involved	2
Statement	2
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:

Bourne v. *Commissioner*, 62 F. 2d 648, certiorari denied, 290 U.S. 650	5
Commissioner v. *Doak*, 234 F. 2d 704	5, 6, 7
Commissioner v. *Moran*, 236 F. 2d 595	5, 6, 7
Commissioner v. *Whitney*, 169 F. 2d 562, certiorari denied, 335 U.S. 892	7
Deputy v. *duPont*, 308 U.S. 488	9
Doyle v. *Mitchell Brothers Co.*, 247 U.S. 179	9
Duignan v. *United States*, 2[illegible] U.S. 195	9
Eisner v. *Macomber*, 252 U.S. 189	9
New Colonial Co. v. *Helvering*, 292 U.S. 435	9
Papineau v. *Commissioner*, 16 T.C. 130	6
Pauli v. *Commissioner*, 11 B.T.A. 784	7
Smith v. *Commissioner*, 40 B.T.A. 1038, affirmed, 113 F. 2d 114	5
Sparkman v. *Commissioner*, 112 F. 2d 774	5
Tilton, Estate of v. *Commissioner*, 8 B.T.A. 914	7
United States v. *Briggs*, 238 F. 2d 53	5, 7
United States v. *Olympic Radio & Television*, 349 U.S. 232	9

Constitution and Statutes: Page

United States Constitution, Sixteenth Amendment 8

Internal Revenue Code of 1939:

Sec. 23 (26 U.S.C. (1952 ed.) 23) 2, 4, 5, 6, 9
Sec. 24 (26 U.S.C. (1952 ed.) 24) 2, 4, 5, 9
Sec. 181 (26 U.S.C. (1952 ed.) 181) 7
Sec. 182 (26 U.S.C. (1952 ed.) 182) 7
Sec. 183 (26 U.S.C. (1952 ed.) 183) 7

Internal Revenue Code of 1954, Sec. 119 (26 U.S.C. 119) 6

Miscellaneous:

1952 Cum. Bull. 5 6
Rev. Rul. 80, 1953-1 Cum. Bull. 62 ..... 2, 5, 7
Treasury Regulations 118:

Sec. 39.22(a)-3 6
Sec. 39.24(a)-2 9
Sec. 39.183-1 ..... 2, 7

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OPINIONS BELOW

The opinion of the Tax Court (Pet. 7b-15b) is reported at 31 T.C. 65. The opinion of the court of appeals (Pet. 1b-7b) is reported at 273 F. 2d 503.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1959 (Pet. 16b). The petition for a writ of certiorari was filed on March 21, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below correctly held that expenses incurred by the resident owners of a resort hotel on the hotel premises for their own meals, lodging, laundry, and utilities, were not deductible business expenses under Section 23(a)(1) of the Internal Revenue Code of 1939, but constituted personal living expenses the deduction of which is specifically barred by Section 24(a)(1).

STATUTES AND OTHER AUTHORITIES INVOLVED

Sections 23(a)(1)(A), 24(a)(1), 181, 182(c), 183(a) of the Internal Revenue Code of 1939, Treasury Regulations 118, Section 39.183-1, and Rev. Rul. 80 are set forth in the Appendix, *infra*, pp. 11-14.

STATEMENT

The facts of this case, which are not in dispute, were found by the Tax Court (Pet. 8b-10b) as follows:

The taxpayers, husband and wife, owned and operated a lodge and guest ranch during 1953 under the name of Twin Pines Lodge and Guest Ranch seven miles west of Stroudsburg, Pennsylvania. All of their income for 1953 was derived from that business. Except for January and December 1953, when the taxpayers were away on vacation, the taxpayers gave their full time and attention to the operation of the resort during 1953. Prior to opening the resort for the year the taxpayers were engaged in making preparations for reopening (Pet. 8b-9b).

During the remainder of the year when they were not on vacation, the taxpayers lived in an apartment which they had built on to the main resort building. There was no door connecting the apartment with the main building. The apartment, which was built at a cost of approximately $3,500, was built by the taxpayers for their personal use. Most of the furnishings in the apartment had been acquired by the taxpayers before they entered into the resort business about 1938. They took no deduction in their income tax return for 1953 for depreciation of the apartment structure or the furnishings therein (Pet. 8b-9b).

During 1953 the resort was open for business about 8½ months or exactly 257 days. During those days, guests were served three meals a day. On each of those days taxpayers together averaged eating a total of five meals in the resort hotel. It was necessary in the operation of the resort that the two taxpayers live there and eat the meals in the resort which they actually ate there during 1953. Other meals eaten by the taxpayers, both when the resort was open and not open for business, were either eaten in restaurants or their apartment where they were prepared from food purchased by the taxpayers. Neither the cost of the taxpayers' meals in restaurants nor the cost of food eaten in their apartment was included in the cost of food used in the operation of the resort and deducted by the taxpayers in their income tax return (Pet. 9b)

In their joint income tax return for 1953, the taxpayers claimed the following deductions as costs or

expenses incurred in the operation of the resort in that year:

Food	$14,156.00
Insurance	1,592.32
Fuel	1,090.68
Electricity	1,054.06
Laundry	456.12
Telephone	390.74

The foregoing amounts included the cost of the food consumed by the taxpayers in the resort, the cost of insurance on the taxpayers' apartment, the cost of heating and electricity for the apartment, the cost of a small amount of cleaning and laundry for the taxpayers, and the taxpayers' use of the telephone at the resort for personal purposes (Pet. 9b-10b).

The Commissioner issued a notice of deficiency disallowing $1,200 of the deductions claimed for operating costs and expenses, on the ground that this amount was attributable to the taxpayers' meals, lodging, and other personal and family living expenses (Pet. 10b). The Tax Court, six judges dissenting, held that these items were deductible as business expenses (Pet. 10b-15b). The Third Circuit, one judge dissenting, noted that the Tax Court's majority decision "constituted a somewhat obdurate adherence to its previous decisions in spite of three Courts of Appeals decisions to the contrary," reversed the Tax Court, and held that the amounts in question were nondeductible personal expenses under Section 24(a)(1) of the 1939 Code and not business expenses under Section 23(a)(1)(A). (Pet. 2b-7b).

ARGUMENT

The decision below is correct, and is in complete accord with the decisions of the Courts of Appeals for the Fourth, Eighth, and Tenth Circuits, uniformly sustaining the Commissioner's position. There is no conflict of decisions, and further review by this Court is not warranted.

1. Section 24(a)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 11-12) prohibits a deduction of personal, living, or family expenses "in any case" in computing net income. The question here is whether the costs of food, shelter, and other personal expenses incurred by taxpayer-owners of a resort hotel business are nevertheless deductible as business expenses under Section 23(a)(1) (Appendix, *infra*, p. 11) merely because it may have been necessary that the taxpayers live and eat on their business premises. Four courts of appeals (including the court below) have passed upon this question. They have uniformly held that, since such expenses must be incurred by everyone in order to live, regardless of business requirements, they remain personal and nondeductible. *Commissioner* v. *Doak*, 234 F. 2d 704 (C.A. 4); *Commissioner* v. *Moran*, 236 F. 2d 595 (C.A. 8); *United States* v. *Briggs*, 238 F. 2d 53 (C.A. 10); see also *Smith* v. *Commissioner*, 40 B.T.A. 1038, 1039, affirmed, 113 F. 2d 114 (C.A. 2); *Sparkman* v. *Commissioner*, 112 F. 2d 774, 777 (C.A. 9); *Bourne* v. *Commissioner*, 62 F. 2d 648 (C.A. 4), certiorari denied, 290 U.S. 650; Rev. Rul. 80, 1953-1 Cum. Bull 62, Appendix, *infra*, pp. 13-14.

The taxpayers assert (Pet. 5-6) that the Tax Court's decision in this case was in accord with its decisions in similar cases. Those decisions, however, like the Tax Court decision in the instant case, were reversed on appeal in the *Doak* and *Moran* cases, *supra*, and there is no conflict among the courts of appeals.

2. In the instant case the Tax Court, besides adhering to its own reversed decisions, relied upon its assertion in *Papineau* v. *Commissioner*, 16 T.C. 130, 132,[1] that while these expenses represented "nondeductible living expenses" the owner of a hotel business who finds it necessary to eat and live at the hotel may deduct them as ordinary and necessary expenses of the business under Section 23(a)(1) of the Code. In effect the Tax Court applied the so-called "convenience of employer" rule, which excludes from an employee's taxable income the value of meals and lodging furnished for the employer's convenience, to allow the taxpayers a deduction. But that rule, both as embodied in Section 39.22(a)-3 of Treasury Regulations 118 and as enacted by Congress in statutory form in Section 119 of the Internal Revenue Code of 1954, specifically refers to "employee[s]." Therefore, the courts of appeals have consistently recognized that the convenience-of-employer rule has relevancy only where the relationship between the supplier and the recipient of the meals and lodging is that of em-

[1] The Commissioner's nonacquiescence in the *Papineau* decision is at 1952-2 Cum. Bull. 5. The *Papineau* case did not involve a disallowed business expense deduction, as does this case, but an addition to the taxpayer's gross income.

ployer-employee and may not serve to reduce the taxable income of the owner of a business who defrays the cost of his own meals and lodging out of his business earnings. *Commissioner* v. *Doak*, *supra*, 234 F. 2d at 707-708; *Commissioner* v. *Moran*, *supra*, 236 F. 2d at 597-598; *United States* v. *Briggs*, *supra*; see also Rev. Rul. 80.

Here the meals and lodging were furnished by the partners of the business to themselves. It is fundamental that the partners or co-owners of a business are the taxable entities, and that the partnership itself has no separate legal existence for tax purposes. *Commissioner* v. *Moran*, *supra*; *Commissioner* v. *Doak*, *supra*; *Commissioner* v. *Whitney*, 169 F. 2d 562, 564-565, 568 (C.A. 2), certiorari denied, 335 U.S. 892; Sections 181, 182, 183 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 12-13). That being the case, it is obvious that a partner cannot be an employee of the partnership, because he cannot be his own employee. *Estate of Tilton* v. *Commissioner*, 8 B.T.A. 914; *Pauli* v. *Commissioner*, 11 B.T.A. 784; Treasury Regulations 118, Section 39. 183-1(b) (Appendix, *infra*, p. 13). It thus follows that the taxpayer-partners could not be "employees" entitled to the benefits of the convenience-of-employer rule.[2]

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[2] As the Eighth Circuit stated in *Commissioner* v. *Moran*, *supra*, 236 F. 2d at 598: "This rule pertains only to a situation where the employer and employee are two taxable entities and has no relevancy where the one furnishing meals and lodging is the same taxpayer receiving them."

The taxpayers claim that regardless of the convenience-of-employer rule, it follows from the fact that an employer can deduct the cost incurred for meals and lodging furnished to an employee that such cost is a deductible business expense even where the owner of a business incurs such costs for his own meals and lodging. But this contention also mistakes the nature of a partner's relationship to the partnership. Even if a partner pays himself a "salary," it is not a deductible business expense. Certainly then in the absence of statutory authorization, partners cannot deduct personal expenses, which would have been necessarily incurred in any event, merely because the expenditures were made in such a way as to help their business. As noted by the court below (Pet. 5b), the taxpayers, since they choose to work as a partnership, are in the same situation as the millions of commuting taxpayers who necessarily incur personal expenses for lunches, clothes, and carfare in order to carry on their business enterprises. To allow the taxpayers here to deduct these personal living expenses would be to discriminate in favor of a relatively small group of taxpayers who can point to no feature which distinguishes their position from that of any taxpayer who must as a necessity of his occupation spend money to eat at his place of work.

3. The taxpayers (Pet. 6-9) now seek for the first time in this proceeding to raise a constitutional issue under the Sixteenth Amendment. They are foreclosed, however, from raising such an issue at this

juncture of the case. *Duignan* v. *United States*, 274 U.S. 195, 200. In any event, the restoration-of-costs argument which they advance reduces itself simply to the contention that they are entitled to a prohibited deduction of necessary living expenses in the guise of an exclusion from their gross business income. The contention finds no support whatsoever in *Eisner* v. *Macomber*, 252 U.S. 189, or in *Doyle* v. *Mitchell Brothers Co.*, 247 U.S. 179, upon which they rely, nor in any other decision.[3] Instead, taxpayers are confronted with the established doctrine that the business expense deductions authorized in Section 23(a)(1) are matters of legislative grace. *United States* v. *Olympic Radio & Television*, 349 U.S. 232, 235, 236; *Deputy* v. *duPont*, 308 U.S. 488, 493; *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440. Therefore, the taxpayers can only claim a deduction under the statute and the deductions here in question are explicitly barred by Section 24(a)(1).

[3] Even assuming that the expenditures in question were capital in nature, as taxpayers suggest, they would represent nondeductible capital expenditures. See 1939 Code Section 24(a)(3); Section 39.24(a)-2 of Treasury Regulations 118.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(26 U.S.C. (1952 ed.) 53)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) [as amended by Sec. 127(b) of the Revenue Act of 1942, *supra*] Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x);

* * * * * *

(26 U.S.C. (1952 ed.) 24)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. (1952 ed.) 181)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. (1952 ed.) 182)

SEC. 183. COMPUTATION OF PARTNERSHIP INCOME.

(a) [as amended by Sec. 9(c)(1) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *General Rule.*—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an

individual, except as provided in subsections (b), (c), and (d).

* * * * * *

(26 U.S.C. (1952 ed.) 183)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.183-1. *Computation of partnership income.* The net income of the partnership shall be computed in the same manner and on the same basis as the net income of an individual, except that:

* * * * * *

(b) * * * Payments made to a partner for services rendered and for interest on capital contributions are not deductible in computing the net income of the partnership, such payments being held to represent a division of partnership profits.

* * * * * *

Rev. Rul. 80, 1953-1 Cum. Bull. 62:

Where the owner of a hotel business lives on the premises, the costs (including cost of goods, wages, general expenses, taxes, depreciation, etc.) attributable to meals, lodging, and other personal or living accommodations of the owner and his family must be eliminated, for Federal income tax purposes, from the costs and expenses of operating the hotel. * * * Where a partnership operates a hotel and the managing partner lives on the premises, it is the position of the Bureau (in line with the nonacquiescence, C. B. 1952-2, 5, in the decision in *George A. Papineau* v. *Commissioner*, 16 T.C. 130) that not only must the costs attributable to such accommodations of the resident partner and his family be eliminated

from operating costs and expenses, but also the resulting increase in partnership income must be included in the resident partner's share of the net profits of the hotel business. For the above purposes, the Bureau will accept a reasonable approximation of the costs attributable to such personal items.

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